Supreme Court of the United States

OCTOBER TERM 1944

No. 335

HATTIE MAE TILLER, EXECUTOR OF THE ESTATE OF JOHN LEWIS TILLER, DECEASED,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER

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RICHMOND, VIRGINIA

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The respondent has presented numerous questions in its brief that were not raised in the petition for certiorari and were not discussed in petitioner's supporting brief which she adopted as her brief on the merits of the case. This reply will be limited to such questions and no effort will be made to rehash arguments heretofore submitted. The general arrangement of respondent's brief will be followed herein.

STATEMENT OF THE CASE

It does not appear necessary to restate the case or to review the facts. The facts have been stated twice by the United States Circuit Court of Appeals, Fourth Circuit,

in 128 F. (2d) 420 and 142 F. (2d) 718, and also by this Court in *Tiller* v. *A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 44, 143 A. L. R. 967. The facts have not changed and the Court now has before it substantially the same evidence as that on which its former findings were based.

QUESTIONS INVOLVED

The sixteen questions listed on pages 21 and 22 of respondent's brief will not be again enumerated here, but they will be argued in the order in which they appear.

ARGUMENT

1. *Court Properly Permitted Amendment of the Complaint.*

Petitioner on the 1st day of June, 1943, filed, with leave of Court, her amended complaint in this action in which she alleged violation by the respondent of the Federal Boiler Inspection Act, 45 U. S. C. A., Section 22, *et seq.*, and the Rules and Regulations prescribed by the Interstate Commerce Commission pursuant thereto (R. 5-9).

No specific reference was made to the Boiler Inspection Act, nor to the said Rules and Regulations of the Interstate Commerce Commission, in the original complaint, and the first allegation of violation thereof was made in the brief filed on behalf of the petitioner at the former trial in this Court. The respondent opposed the amendment on the grounds that it sought to introduce new subject matter as a new cause of action, raised as a cause of action a new and different state of facts from those alleged in the original complaint, and sought a departure from law to law, all after the expiration of

the limitation period of three years prescribed by the Federal Employers' Liability Act. The Court, being of the opinion "that the ends of justice require that leave to file said amended complaint be given," entered its order directing that it be filed (R. 5).

It is well settled that in an action brought under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, *et seq.*, violations of the Federal Boiler Inspection Act and the Rules and Regulations of the Interstate Commerce Commission adopted pursuant thereto may be alleged as acts of negligence. *Baltimore & Ohio Railroad Co.* v. *Groeger, Admx.* (1925), 266 U. S. 521, 45 S. Ct. 169; *Lilly* v. *Grand Trunk Western R. Co.* (1943), 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411. The right to amend a complaint, after remand of a case on appeal to the District Court for further proceedings, for the purpose of presenting new issues not inconsistent with the appellate court's judgment is also well established. *Jones* v. *St. Paul Fire & Marine Ins. Co.* (C. C. A. 5th, 1939), 108 F. (2d) 123. The sole issue, therefore, is whether petitioner's amended complaint presented a new cause of action which is barred by the statute of limitations.

Petitioner's Amended Complaint Does Not Present a New Cause of Action.

Petitioner's original complaint (R. 1) alleged a cause of action under the Federal Employers' Liability Act arising from the death of petitioner's decedent resulting from certain injuries caused by the negligence of the respondent. It did not allege a violation of the Federal Boiler Inspection Act or the Rules and Regulations of the Interstate Commerce Commission as a specific act of negligence. The amended complaint (R. 7) alleges

a cause of action under the Federal Employers' Liability Act arising from the death of petitioner's decedent resulting from certain injuries caused by the negligence of the respondent and specifically alleges the violation of the Federal Boiler Inspection Act and the Rules and Regulations prescribed by the Interstate Commerce Commission pursuant thereto.

The Boiler Inspection Act was enacted and the Rules and Regulations of the Interstate Commerce Commission were promulgated for the safety and protection of railroad employees. They prohibit the use of unsafe locomotives and appurtenances, require the use on locomotives and tenders of certain safety devices, provide for certain inspections and tests, and prescribe certain penalties upon the companies for the violation of their provisions. They do not provide any civil relief to employees for injuries resulting from their violation. They prescribe no cause of action for the employee. Action for civil relief must be brought under the provisions of the Federal Employers' Liability Act. So far as the rights of the employee are concerned, the violation of the Boiler Inspection Act is merely an act of negligence, for which a cause of action lies under the Federal Employers' Liability Act. This is clearly stated in the case of *Baltimore & Ohio Railroad Co.* v. *Groeger, Admx.* (1925), 266 U. S. 521, 45 S. Ct. 169, at page 528, where the Court said:

> "That act (the Boiler Inspection Act) was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act. Under the latter, defendant is liable for any negligence chargeable to it which caused or contributed to cause decedent's death (Sec. 1); and he will not be held guilty of contributory negligence (Sec. 3) or to have assumed the risks of his employ-

> ment (Sec. 4) if a violation of Section 2 of the Boiler Inspection Act contributed to cause his death."

Petitioner's amendment, therefore, does not allege a new cause of action or seek a departure from law to law. It merely expands or amplifies the original allegation of negligence by alleging an additional act of negligence in support of the cause of action originally asserted. *Seaboard Air Line Ry.* v. *Renn* (1916), 241 U. S. 290, 36 S. Ct. 567, 60 L. Ed. 1006. See also *Clinchfield R. Co.* v. *Dunn* (C. C. A. 6th, 1930), 40 F. (2d) 586, 587, certiorari denied, (1930), 282 U. S. 860, 51 S. Ct. 34, 75 L. Ed. 761, where the Court said:

> "Much latitude of amendment is properly allowed to save the cause of action, if possible, from the bar of limitations. This is especially so where, as here, there is reasonable ground for holding the amendment to be only an amplification and expansion of the cause of action, as the defendant itself must have always recognized it was intended to be prosecuted."

As a matter of fact, an amendment of petitioner's complaint was not necessary to inject the question of the violation of the Federal Boiler Inspection Act into this proceeding. Petitioner's original complaint alleged negligence on the part of the respondent, respondent's officers, agents and servants. The uncontroverted testimony in this case disclosed that there was no light on the rear of the engine pushing the cars which struck the petitioner's decedent. Petitioner contends that this was a violation of the Boiler Inspection Act and the Rules of the Interstate Commerce Commission adopted pursuant thereto. In view of this evidence, petitioner would have been entitled to an instruction based on the Boiler In-

spection Act and the Rules of the Interstate Commerce Commission regardless of the amendment. The amended complaint was filed so that the respondent would not be taken by surprise at the trial.

Even prior to the adoption of the Federal Rules of Civil Procedure, the courts followed a very liberal policy in allowing amendments to pleadings. In the language of Judge Parker in *United States* v. *Powell* (C. C. A. 4th, 1938), 93 F. (2d) 788, 790:

> "The attitude of the Supreme Court on the question of permitting amendments of this character was well stated in the recent case of *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 68, 53 S. Ct. 278, 280, 77 L. Ed. 619, as follows: 'It has fixed the limits of amendment with increasing liberality. A change of the legal theory of the action, "a departure from law to law", has at times been offered as a test. *Union Pac. Ry. Co.* v. *Wyler*, 158 U. S. 285, 295, 15 S. Ct. 877, 39 L. Ed. 983. Later decisions have made it clear that this test is no longer accepted as one of general validity. Thus, in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, plaintiff suing in her individual capacity under a Kansas statute for her son's death was allowed to amend to sue as administratrix under the Federal Employers' Liability Act, 45 U. S. C. A. Sections 51-59, after the statute of limitations would have barred another action. In *New York Central & H. R. R. Co.* v. *Kinney*, 260 U. S. 340, 43 S. Ct. 122, 67 L. Ed. 294, there was in substance the same ruling. In *Friedericksen* v. *Renard*, 247 U. S. 207, 38 S. Ct. 450, 62 L. Ed. 1075, a cause of action by a defrauded buyer to set aside a contract was turned into a cause of action to recover damages for deceit. "Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to

enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied." ' "

In *Maty* v. *Grasselli Chemical Co.* (1938), 303 U. S. 197, 58 S. Ct. 507, plaintiff, who had alleged that he was injured while employed in the Silicate Department of his employer's chemical plant by inhaling gases or injurious substances, was permitted to amend his complaint after the period of limitation had run so as to allege that he was also employed in other departments of the employer's plant, particularly the Phosphate Department and Dorr Department. Delivering the unanimous opinion of the court, Mr. Justice Black said, at page 200:

"Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. The original complaint in this cause and the amended complaint were not based upon different causes of action. They referred to the same kind of employment, the same general place of employment, the same injury and the same negligence. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment. The effect of the amendment here was to facilitate a fair trial of the existing issues between plaintiff and defendant. The New Jersey statute of limitations did not bar the amended cause of action."

b. The Amendment Relates Back to Date of Original Complaint.

The generous attitude of the courts in permitting amendments, which had been developed by numerous

decisions over a period of years was codified in Rule 15 (c) of the Federal Rules of Civil Procedure, which reads as follows:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The effect of this rule is well stated by Judge Underwood, of the District Court, S. D. Ohio, E. D., in *White* v. *Holland Furnace Co., Inc.* (1939), 31 F. Supp. 32, as follows:

> "Plaintiff's second claim is based upon the same facts set forth in the original petition, the only change being one of theory from contract to tort for conversion under the Michigan pledgor-pledgee statute. Before the Federal Rules the Supreme Court had allowed amendments to pleadings when the statute of limitation would otherwise have been a bar where the only change was 'from law to law'. *United States* v. *Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 67, 53 S. Ct. 278, 280, 77 L. Ed. 619. See *Clinchfield R. Co.* v. *Dunn*, 6 Cir., 1930, 40 F. 2d 586, 74 A. L. R. 1276 certiorari denied, 1930, 282 U. S. 860, 51 S. Ct. 34, 75 L. Ed. 761. Under the present rules, unless there is a substantial change from the claim as originally alleged the amendment will relate back to the beginning of the action and is not barred by the statute of limitations. *Perry* v. *Southern Ry. Co.*, D. C. E. D. Tenn. Aug. 30, 1939. 29 F. Supp. 1006. * * * * *
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> "The general rule stated by the courts is that an amended petition will not relate back to the time of filing the original, thereby removing the bar of the

statute of limitations where the amendment states a new cause of action. *Missouri, K. & T. R. Co.* v. *Wulf*, 1913, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; *United States* v. *Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. This rule has been applied to deny amendments changing the action from one in contract to one in tort. *Haas Brothers* v. *Hamburg-Bremen Fire Ins. Co.*, 9 Cir., 1910, 181 F. 916; *Buerstetta* v. *Tecumseh Nat. Bank*, 1899, 57 Neb. 504, 77 N. W. 1094. The decisions since the new rules have not changed this general rule. They hold that an amended petition cannot introduce a new cause of action when the same is barred by the statute of limitations. *L. E. Whitham Const. Co.* v. *Remer*, 10 Cir., 1939, 105 F. 2d 371; *Ronald Press Company* v. *Shea*, D. C. S. D. N. Y. 1939, 27 F. Supp. 857. But the rule has been broadened by liberalizing the meaning of the term 'cause of action' by the courts and the new federal procedure.

"The emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim. *New York Central R. R.* v. *Kinney*, 1922, 260 U. S. 340, 43 S. Ct. 122, 67 L. Ed. 294; *United States* v. *Memphis Cotton Oil Co.*, 1933, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. The new rules have adopted the words 'claim' or 'claim for relief' in place of the term 'cause of action', which shows an attempt to avoid the concept of that term adopted by some courts prior to the rules.

"To give effect to Rule 15(c), 28 U. S. C. A. following section 723c, the Court should allow an amendment of a pleading where the factual situation was not changed though a different theory of recovery is presented. It provides that 'Whenever the claim * * * arose out of the conduct, transaction, or occurrence set forth * * * the amendment relates back to the date of the original pleading.' "

In the instant case the claim asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth in the original complaint, and the amendment, under Rule 15(c), therefore, relates back to the date of the original complaint.

The Court's attention is particularly directed to the very able memorandum opinion of the District Court on this question (R. 13).

2. *The Verdict of the Jury and Judgment of the District Court are Amply Supported by the Evidence and Should Be Upheld.*

Respondent's questions numbered 2, 3, 4, 5 and 6 which its counsel discuss on pages 31 to 50, inclusive, of their brief are fully covered in petitioner's brief in support of her petition for certiorari at page 11, *et seq.*

3. *The Report of the State Corporation Commission of Virginia was Properly Admitted as Evidence.*

This report was made under oath by the superintendent of transportation of the respondent pursuant to the requirements of the applicable Virginia statute. It should be noted that the statement is an unequivocal one of fact; yet respondent takes the position that the manner in which the petitioner's decedent was injured is a matter of speculation and conjecture. Surely there could be no clearer illustration of an admission against interest which under settled principles of law may be offered in evidence; the respondent indeed does not dispute this proposition, but argues that since the report required by Act of Congress to the Interstate Commerce Commission is privileged by Federal statute, the trial court should have excluded that to the State Corporation Commission which is not privileged by either State or Federal statute.

The privilege granted for the Interstate Commerce

Commission report does not and cannot extend to the State Corporation Commission report which is a matter governed by the law of Virginia. The privilege is purely statutory in origin, and is confined to the express terms of the statute which creates it. Wigmore on Evidence, (3rd Ed.), Vol. VIII, Sec. 2377, p. 761.

Therefore, in the absence of an applicable statute privileging the report to the State of Virginia, it is admissible.

> "In an action for injury by a railroad, 'evidence of statements by the conductor and trainmaster as to the cause of the accident is admissible, where they were required by the railroad company to ascertain and report the cause of the accident for such declarations were within the scope of their duty, and being so they are declarations of the principal'." *Chicago, St. P. M. & O. Ry. Co.* v. *Kulp,* 102 F. (2d) 352 (C. C. A. 8th, 1939), certiorari denied (1939), 307 U. S. 636, 59 S. Ct. 1032, 83 L. Ed. 1518.

So also the declarations of the general agent of an insurance company whose duty included investigation and adjustment of claims that the insured had had a fall causing disability are admissible against the insurer. *London Guarantee & Accident Co.* v. *Woelfe,* (C. C. A. 8th, 1936), 83 F. (2d) 325.

Again a foreman's report of an accident to his employer is admissible. *Fitzgerald* v. *Lozier Motor Co.,* (1915) 187 Mich. 660, 154 N. W. 67.

And the statements of a party to a suit at the coroner's inquest as to how the accident happened are admissible in subsequent civil litigation. *Reed* v. *McCurd* (1899), 160 N. Y. 330, 54 N. E. 737.

It should be noted that this report was introduced at the first trial over the protest of the respondent. The question of its admissibility was argued before the Cir-

cuit Court of Appeals at the first trial in that court but was not mentioned in the court's opinion. The question was not raised before this Court at the former hearing, but there has not been any intimation by any court throughout the entire proceedings that the report is not proper evidence, and the Circuit Court of Appeals held at the last hearing that there was no error in admitting the report in evidence (R. 207).

4. *The Question of an Unusual or Unexpected Movement.*

This question has been fully covered in petitioner's brief in support of her petition for certiorari at page 18.

5. *The Road Engine was Being Used in "Yard Service".*

The question for determination here is whether the road engine was used in yard service, within the meaning of Rule 131 of the Interstate Commerce Commission regulating steam locomotives and tenders and their appurtenances, and not whether its movements were such as to justify a yard day pay for its crew under certain labor agreements between the railroad and its employees. Rules Nos. 129 and 131 of the Interstate Commerce Commission might have been limited to road engines and yard engines respectively. Instead, however, they cover "locomotives used in road service" and "locomotives used in yard service." If, therefore, a road engine is for the time being used in yard service, it must comply with the provisions of Rule No. 131.

The respondent contends that in the instant case the road engine was merely getting out of the way so that the yard engine could do the necessary switching in classifying the train. In reply, petitioner respectfully directs the attention of the Court to the movements of the two engines from the time they arrived at Clopton

Yard until the classification of the train was completed. The yard engine, when it arrived from Byrd Street, cut off certain cars and proceeded south with those cars on the main southbound line to a point south of the cross-over switch (one move). It then backed into the cross-over up to the cars on the hill where it attached one of its cars to the cars on the hill (two moves). It then retraced its movement to the southbound main line (three moves). It then backed northwardly on the southbound main line to the cars which it had left (four moves). It coupled to those cars and after making a new cut in the cars, proceeded south to the lower end of the yard (five moves).

The road engine, when it arrived at Clopton Yard, cut off three cars and proceeded with them southward across Clopton Road to Track No. 1 (one move). It then backed northward into slow siding (two moves). After the yard engine had coupled one car to the cars left on the hill and had gotten out of the way, the road engine proceeded with its three cars southward over the cross-over to the main line southbound track (three moves). It then proceeded back northwardly on the southbound main line and coupled the three cars which it was carrying, to the cars left by the yard engine on the southbound track (four moves). It then proceeded southward on the southbound main line past the cross-over switch (five moves). It then backed over the cross-over with its train of cars to the cars on the hill (six moves). After coupling all the cars, thereby completing the train, it proceeded southward over the cross-over to the southbound main line (seven moves), and continued its journey south. All of these movements were necessary to the proper classification of the train (R. 139). In this classification the road engine made seven movements within the yard, as compared with five made by the yard engine. These

movements were made over the same tracks used by the yard engine and the road engine carried with it at all times throughout the entire movement a varying number of cars. In the face of these undisputed facts, the opinions of witnesses as to whether the road engine was engaged in road or yard service are of no effect.

The Judge of the District Court offered to charge the jury as a matter of law that the road engine was used in yard service, but at the request of counsel for the petitioner submitted the question to the jury under a proper instruction. There can be no question of the fact that the evidence is sufficient to justify the jury in finding that the road engine was used in yard service. See *Chesapeake & O. Ry. Co.* v. *Wood*, (C. C. A. 6th, 1932) 59 F. (2d) 1017; Certiorari denied (1932) 287 U. S. 647, 53 S. Ct. 92, 77 L. Ed. 559.

6. Statutory Requirement as to a Light on the Lead End of the Back-Up Movement.

No assertion was made at any time during the trial of this case that any statute or regulation adopted pursuant to statute required a light on the lead end of the back-up movement. There was, therefore, no reason for the Court to give the charge requested by the defendant on this subject. As stated by the District Court (R. 190):

> "You cannot negative every requirement. I cannot tell the jury what is not the duty; I can only tell them what is the duty."

7. Engineering Questions.

Respondent contends that questions which he terms "engineering questions" should be left entirely to the decision of the respondent. In other words, if an engineering question is involved the railroad is at liberty to determine it to its own advantage without any con-

sideration for the safety or welfare of its employees. It is conceded that the respondent operated its railroad on that theory. Its employees recognized the fact. Mr. Myrick crudely expressed the thought when he said (R. 42):

> "Everyone would have to watch for hisself in yard service."

Certainly learned counsel for the respondent will not seriously contend, however, that the law gives the respondent any such unlimited rights.

8. *Respondent's Rule 103.*

Respondent's Rule 103 was published in its printed rule book and distributed to its employees. The Rule was properly admitted as evidence during the trial of the case (R. 96). The respondent elicited opinions from several of the witnesses as to the proper interpretation of the Rule. There was no error in permitting the jury to pass upon the applicability of the Rule to the facts in this case.

9. *Respondent's Rule 24.*

Respondent claims that the road engine was not being used in yard service and was not required to carry a rear light as prescribed by Rule 131 of the Interstate Commerce Commission because it was not engaged in "classifying" or "switching" within the yard. Respondent's Rule 24, published in its printed Rule Book and distributed to its employees, provides:

> "When cars are pushed by an engine, except when shifting or making up trains in a yard, a white light must be displayed on the front end of the leading car by night."

Here the respondent is caught between Scylla and Charybdis. The road engine was either "switching" or

"making up the train" or it was not "switching" or "making up the train". If it was switching or making up the train, it was required to have a light on the rear of the locomotive as prescribed by Rule 131 of the Interstate Commerce Commission. If it was not switching or making up the train it should have had a white light displayed on the front end of the leading car as prescribed by respondent's Rule 24. The uncontradicted evidence shows that it did not have either. Respondent, therefore, unquestionably violated either Rule 131 or Rule 24.

10. *Verdict of the Jury should be Upheld on Issue Properly Submitted.*

This question has been fully covered in petitioner's brief in support of her petition for certiorari, at page 11.

CONCLUSION

In conclusion, counsel for the petitioner respectfully submit that this case was carefully and properly tried in the District Court; that the judge was exceedingly patient and indulgent with both sides throughout the trial; that the case was submitted to the jury in accordance with the mandate of this Court with a charge that correctly stated the law of the case in a clear and impartial manner; that the jury properly found a verdict for the petitioner; that the District Court properly entered judgment on the verdict of the jury; and that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit reversing the judgment of the District Court should be reversed.

Respectfully submitted,

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